

W.P.(C) 9084/2009 & CM 6652/2009

CENTRE FOR DEVELOPMENT OF
ADVANCED COMPUTING Petitioner

Through Mr. Dayan Krishnan with
Mr. Amit Gupta, Mr. Gautam Narayan and
Mr. Nikhil Menon, Advocates

versus

BRIG.(RETD.) UJJAL DASGUPTA & ANR. Respondents

Through Mr. Vivek Singh Bishnoi, Advocate
for R-1.
Mr. P.P. Malhotra, Addl. Solicitor General with
Mr. Sachin Datta, Advocate for R-2/UoI.

CORAM: JUSTICE S. MURALIDHAR

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| 1. | Whether reporters of local paper may be allowed to see the order? | No |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the order should be referred in the digest? | Yes |

ORDER
06.04.2010

1. The challenge in this writ petition by the Centre for Development of Advanced Computing (CDAC) is to the impugned order dated 4th May 2009 passed by the Central Information Commission (CIC) in an appeal filed by the Respondent No.1 Brig. Ujjal Dasgupta.

2. Respondent No.1 filed an application on 30th June 2008 under the Right to Information Act, 2005 ('RTI Act') seeking information with respect to the software developed for the Project Anveshak for the Research and Analysis Wing (R&AW) of the Cabinet Secretariat by the Petitioner CDAC. On 4th September 2008 Respondent No. 1 filed an appeal before the CIC under Section 19(1) of the RTI Act on the ground that no response

had been received from the Central Public Information Officer (CPIO) of CDAC till then. The Petitioner rejected the application filed by Respondent No. 1 and informed him of this decision by a letter dated 11th September 2008. According to the Petitioner, the information sought by Respondent No. 1 related to the Project Anveshak software developed by the Petitioner under a contract with the Government of India in terms of which CDAC was bound to maintain total confidentiality of information. On 16th October 2008, Respondent No. 1 sent a complaint to the CIC on the ground that there was no response to his request for information by the CPIO and the Appellate Authority. Meanwhile on 18th October 2008, the Appellate Authority informed Respondent No.1 that the information sought for could not be disclosed as per Section 8(1)(d) of the RTI Act.

3. On 2nd December 2008, Respondent No. 1 filed an appeal before the CIC under Section 19(3) of the RTI Act. On 18th December 2008 the Petitioner wrote to Respondent No. 1 reiterating that it is bound to follow the terms and conditions of the contract and therefore could not disclose the information. It was inter alia mentioned that the Petitioner had sought the opinion of the Cabinet Secretariat through a letter dated 25th November 2008. By a communication dated 11th December 2008 addressed to the Petitioner, the Cabinet Secretariat had denied CDAC permission to pass on any information relating to Project Anveshak “due to its sensitivity and operational methodology attached to national security”. Additionally, the Cabinet Secretariat had mentioned that because “the case is subjudice and any further elaboration may adversely affect ongoing legal proceedings”.

4. At the hearing of the appeal before the CIC on 31st March 2009 in which the CDAC and Respondent No. 1 participated through video conferencing, the CIC orally directed the Petitioner to refer the application made by Respondent No. 1 to the R&AW in terms of Section 11(1) of the RTI Act. Consequent thereto, on 6th April 2009, the Petitioner wrote to Respondent No. 3 Cabinet Secretariat (R&AW) and sent a reminder on 13th April 2009. In its response dated 22nd April 2009, the Cabinet Secretariat pointed out that the R&AW was exempt from the purview of the RTI Act and that disclosure of any information in relation to Project Anveshak would be against national interest and the security of the State. Along with its written submissions before the CIC, the CDAC placed a copy of the above communication dated 22th April 2009 of the R&AW. CDAC submitted that the information related to a third party, which had denied permission to the CDAC to disclose it. It was also pointed out that the material related to an organization exempted from the purview of the RTI Act.

5. In its impugned order dated 4th May 2009 the CIC discussed the nature of information sought by Respondent No. 1 and concluded that it did not fall under any of the exempted categories under Section 8(1) of the RTI Act. Consequently, it held that the CDAC, being a public authority in custody of information “which is completely unrelated with the confidential, sensitive data relating to operational methodology as referred by R&AW”, was under an obligation to divulge the information as available with it. Consequently, the CPIO of the CDAC was directed to

furnish Respondent No. 1 “with all the information as sought by him in the RTI application by 25 May, 2009 under intimation to the Commission.”

6. While directing notice to be issued in this petition on 20th May 2009, this Court stayed the operation of the impugned order.

7. This Court has heard the submissions of Mr. Dayan Krishnan, the learned counsel appearing for the CDAC, Mr. Vivek Bishnoi, counsel appearing for Respondent No. 1 and Mr. P.P. Malhotra, the learned ASG appearing for Respondent No.2 Union of India.

8. Section 11 of the RTI Act which deals with third party information reads as under:

“11. Third party information. (1)Where a Central Public Information Officer or the State Public information Officer, as the case may be intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

(3) Notwithstanding anything contained in section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request under section 6, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.

(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under section 19 against the decision.”

9. The oral direction issued by the CIC at the hearing on 31st March 2009 requiring the CDAC to refer the application by Respondent No. 1 to the R&AW, was consistent with the requirement of Section 11(1) of the RTI Act. Strangely, however, the CIC does not advert to the compliance by the CDAC with the above direction when it wrote to the Cabinet Secretariat on 6th and 13th April 2009. It also does not refer to the reply dated 22nd April

2009 sent by the Cabinet Secretariat to the CDAC stating the reasons for declining permission to disclose the information.

10. Third party information also assumes relevance in the context of Section 19(4) of the RTI Act which enables the CIC, while hearing an appeal, to ascertain the response of the third party. Section 19(4) of the RTI Act reads as under:

“19. Appeal. (4) If the decision of the Central Public Information Officer or State Public Information Officer, as the case may be, against which an appeal is preferred relates to information of a third party, the Central Information Commission or State Information Commission, as the case may be shall give a reasonable opportunity of being heard to that third party.”

11. It is plain to this Court from a reading of Sections 11 and 19(4) of the RTI Act that once the CIC acknowledges that the information sought pertains to a third party, in this case, R&AW, then without notice to such third party and hearing its views in the matter, the CIC cannot proceed further in the matter. Whether in fact the public interest in the disclosure of the information outweighed in importance any possible harm or injury to the interest of such third party in terms of the provision of Section 11(1) of the RTI Act, had to be decided by the CIC only after hearing such third party. Inasmuch as the software of the Project Anveshak has been developed exclusively for the R&AW, the question of disclosure of any such information had to be decided only after hearing the R&AW.

12. There is yet another ground on which the CIC erred. Section 24(1) of the RTI Act states that the Act will not apply to intelligence and security organizations specified in Second Schedule to the Act. At Serial No. 2 in the Second Schedule to the RTI Act is listed “Research and Analysis Wing of the Cabinet Secretariat”. In terms of the proviso to Section 24 where the information sought is in respect of allegations of violation of human rights or allegations of corruption, it is not excluded. However, this could also not be decided by the CIC without hearing the R&AW. The CIC having noted that the information pertained to Project Anveshak of the R&AW, ought to have first and foremost considered the applicability of Section 24 of the RTI Act before proceeding to consider whether the information stood exempted under any other provision of the RTI Act.

13. Clearly, therefore, the CIC was in error in overlooking Section 24 of the RTI Act as well as Section 11 read with Section 19 thereof.

14. For the aforementioned reasons, the impugned order is unsustainable in law and is hereby set aside. The appeal of Respondent No. 1 is revived before the CIC which will proceed in accordance with law. Notice will be issued by the CIC to the R&AW and it shall be given an opportunity to file a reply and of being heard before the final orders can be passed in the Respondent No. 1’s appeal by the CIC. The CIC is requested to dispose of the appeal of Respondent No. 1 within a period of four months from the date of receipt of a copy of this order.

15. The writ petition stands allowed in the above terms. The application stands disposed of. A certified copy of this order will be delivered to the CIC within five days from today.

S. MURALIDHAR, J.

APRIL 06, 2010
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